JAMES CLEMENT HII GIN KION v. MENTERI SUMBER MANUSIA & ANOR

HIGH COURT MALAYA, PULAU PINANG
COLLIN LAWRENCE SEQUERAH JC
[JUDICIAL REVIEW NO: 25-84-07-2014]
29 JANUARY 2015

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application to quash Minister's decision not to refer representations to Industrial Court – Whether it was for Minister to delve into merits of case – Whether principle of estoppel applicable in industrial adjudication – Applicant's acceptance of compensation for separation of employment – Whether applicant could seek remedy of reinstatement from Industrial Court – Matters arising in conciliation proceedings – Whether could be used during adjudication proceedings under s. 54 Industrial Relations Act 1967 – Whether representations under s. 20(1) Industrial Relations Act 1967 perverse, frivolous and vexatious – Whether Minister's decision unreasonable in Wednesbury sense and liable to be quashed*

LABOUR LAW: *Industrial Court – Reference by Minister – Industrial Relations Act 1967, s. 20 – Minister's refusal to refer representations to Industrial Court – Judicial review – Application for – Whether it was for Minister to delve into merits of case – Whether principle of estoppel applicable in industrial adjudication – Applicant's acceptance of compensation for separation of employment – Whether applicant could seek remedy of reinstatement from Industrial Court – Matters arising in conciliation proceedings – Whether could be used during adjudication proceedings under s. 54 Industrial Relations Act 1967 – Whether representations under s. 20(1) Industrial Relations Act 1967 perverse, frivolous and vexatious – Whether Minister's decision unreasonable in Wednesbury sense and liable to be quashed*

The applicant was employed by the second respondent as Department Manager-Finance (Internal Audit) since 5 January 2009. Sometime in April 2013, the applicant was informed that his performance had not met with the expectations of the Internal Audit Director of the second respondent. A teleconference was conducted to discuss the performance concerns related to the applicant as well as to discuss various career options. Following this, the second respondent proposed that the applicant be placed on a performance improvement plan ('PIP'), which the applicant was not agreeable to. The applicant alleged that there was an attempt to oust him from the employment of the second respondent. In respect of the option to receive reasonable compensation and to mutually end the employment relationship, the applicant and the second respondent were not able to achieve any consensus in respect of the quantum of the compensation. The second respondent sent a letter to the applicant recording their terms of the separation of employment and thereafter credited the amount due by way of compensation for the separation of employment as stipulated in the said letter into the applicant's bank account. The applicant sent an email registering his protest with the letter of separation and considered his employment terminated by

the company without his consent. The applicant, however, did not return the compensation paid by the second respondent. The applicant then made a representation for reinstatement to his employment under s. 20 of the Industrial Relations Act 1967 ('IRA'). Thereafter, the first respondent exercised his discretion not to refer the applicant's case to the Industrial Court for adjudication. Hence, this application for judicial review by the claimant for orders of *certiorari* to quash the decision of the first respondent and for *mandamus* directing the first respondent to refer the matter to the Industrial Court.

Held (allowing application):

(1) It is the duty of the Industrial Court in a reference under s. 20 of the IRA to determine whether or not, firstly, there was a termination and secondly, if so, whether the termination was for just cause and excuse. Therefore, the question of whether or not the applicant was justified in refusing to accept the PIP which eventually led to the compensation package being paid to him in return for him leaving the employment of the second respondent and the concomitant question of whether under those circumstances there was a termination of employment as contended by the applicant were matters within the sole competence of the Industrial Court. It was not for the first respondent to delve into the merits of the case in order to determine the matter. (para 22)

(2) The first respondent had relied on the fact that even though the applicant had registered his protest to the separation, he had never returned the compensation money he received from the second respondent. The first respondent contended that the applicant was thus estopped from proceeding with his representation for unfair dismissal. However, the normal rules of evidence and procedure that normally operate in the sphere of civil evidence and procedure do not apply with equal force to industrial proceedings. Even though s. 30(5) of the IRA applied to proceedings before the Industrial Court, the spirit and intention of the IRA and the manner in which industrial disputes ought to be approached as a whole is clearly evident. The principle of estoppels has no place in industrial adjudication. (paras 24 & 25)

(3) The fact that the Industrial Court chooses not to grant reinstatement but compensation in appropriate cases does not detract from the fact that the primary remedy is reinstatement. Should the Industrial Court eventually find that the termination was without just cause or excuse, being a court enjoined to act according to equity and good conscience, in assessing any compensation due to the applicant, without doubt will have due regard to any monies paid and the appropriate deduction would be made for the compensation already received. Therefore, the fact that the applicant accepted the compensation from the second respondent does not in any way prevent or bar him from seeking the remedy of reinstatement from the Industrial Court. (para 25)

(4) From the applicant's perspective, the intention to place him on the PIP arose out of the concerns of the second respondent in respect of his performance and that the reason he refused to agree to the implementation of the PIP was his perception that it was the second respondent's intention to exit him from the company obviously on grounds of poor performance. Whether the applicant's perception was reasonable or not under the circumstances was not one for the first respondent to make but was a question that was best left to the Industrial Court. The first respondent had therefore embarked on a consideration of the merits of the dispute and so exceeded his province by taking into account an irrelevant consideration. (para 26)

(5) Matters that transpired during the conciliation hearing were not meant to be used against the applicant in the event no settlement was reached. Parties are encouraged to be forthright while engaged in discussions to reach an amicable settlement and it would be inimical to such efforts if parties were aware that should the attempts to conciliate fail, what they had disclosed might come back to haunt them. The IRA is a piece of social legislation engineered with a view to promote industrial harmony. Section 54 of the IRA prohibits matters arising in conciliation proceedings from being used during adjudication proceedings at the Industrial Court. (para 27)

(6) The representations made under s. 20(1) IRA were neither perverse, frivolous nor vexatious. The decision of the first respondent was a decision no body similarly circumstanced would arrive at and therefore was unreasonable in the *Wednesbury* sense and thus liable to be quashed as being irrational. (para 29)

Case(s) referred to:

Ambank (M) Berhad v. Menteri Sumber Manusia & Anor And Other Appeal [2014] 1 LNS 686 CA ***(refd)***

Council of Civil Service Unions and Others Appellants v. Minister for the Civil Service Respondent [1985] AC 374 ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(dist)***

Joseph Puspam v. Menteri Sumber Manusia, Malaysia & Anor [2001] 4 CLJ 252 CA ***(refd)***

Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227 CA ***(refd)***

Minister of Labour & The Government of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 ***(refd)***

Minister of Labour, Malaysia v. Sanjiv Oberoi & Anor [1990] 1 CLJ 44; [1990] 1 CLJ (Rep) 200 SC ***(refd)***

Nadarajah & Anor v. Golf Resort (M) Sdn Bhd [1991] 1 ILR 704 HC ***(refd)***

O'Reilly v. Mackman [1982] 3 WLR 604 ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(foll)***

Tenby World Sdn Bhd v. Soh Chong Wan & Anor [2013] 10 CLJ 822 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25(2)
Industrial Relations Act 1967, ss. 20(1), (3), 30(5), 54
Rules of Court 2012, O. 53 r. 2(2)
Specific Relief Act 1950, s. 44

For the applicant - Pang Kong Seng; M/s KS Pang & Co
For the first respondent - Zahruddin Mohamed Isa; SFC
For the second respondent - Pravin Kaur; M/s Jessy & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Collin Lawrence Sequerah JC:

The Application Before The Court

[1] The applicant above named by way of this application for judicial review seeks to quash by way of *certiorari* the decision made by the Honourable Minister of Human Resources ('first respondent') on 30 April 2014 in refusing to refer the applicant's complaint of representation for unfair dismissal to the Industrial Court for an award. He also seeks an order of *mandamus* to direct the Minister to refer the dismissal of the applicant to the Industrial Court for adjudication.

Salient Background Facts

[2] The applicant was employed by the second respondent as Department Manager-Finance (Internal Audit) since 5 January 2009. Sometime in April 2013, the applicant was informed that his performance had not met with the expectations of the then Internal Audit Director of the second respondent. The issues raised in respect of the applicant's performance were in the areas of project and time management skills, technical internal audit skills and interpersonal skills. This fact was evidenced by an email exhibited as exh. "JH3" annexed to the affidavit of the applicant affirmed on 9 July 2014, hereinafter, (applicant's affidavit in support). On 29 August 2013, the Manager of Human Resources of the second respondent arranged for a teleconference involving the applicant and some senior management of the second respondent which also included the said Internal Audit Director. The purpose of the teleconference was to discuss the performance concerns related to the applicant as well as to discuss various career options. Following this, the second respondent proposed that the applicant be placed on a performance improvement plan ('PIP'). The applicant had also suggested through an email dated 3 September 2013, exh. "JH5" of the applicant's affidavit in support, two other options. These were, granting him sufficient time to look for alternative employment in a similar position or that he be paid reasonable compensation to leave the second respondent's employment respectively. There appears to be some dispute as to whether it was the applicant or the second respondent who suggested that the applicant be placed on the PIP, but in any event what is clear is that the

applicant was not agreeable to be placed on the PIP. The applicant's reason was that he alleged that there was an attempt to oust him from the employment of the second respondent. This allegation was however denied by the second respondent by way of an email dated 18 September 2013 annexed as exh. "JH7" of the applicant's affidavit in support. In respect of the option proposed that the applicant look for alternative employment, the applicant had raised the issue of the limited opportunities available in Penang for the position of internal auditor and that he felt that job opportunities for the position would only materialise towards the end of 2014. The applicant was therefore unable to commit to a timeline in which he could obtain alternative employment. In respect of the option to receive reasonable compensation and to mutually end the employment relationship, the applicant and the second respondent were not able to achieve any consensus in respect of the quantum of the compensation. As the second respondent was unable to agree to the quantum as stipulated by the applicant, the second respondent sent a letter to the applicant dated 1 October 2013, exh. "JH9" of the applicant's affidavit in support recording their terms of the separation of employment. The second respondent thereafter credited the amount due by way of compensation for the separation of employment as stipulated in the said letter into the applicant's bank account. The applicant on 1 October 2013 sent an email registering his protest with the letter of separation dated 1 October 2013 and considered his employment terminated by the company without his consent. The applicant however, did not return the compensation paid by the second respondent.

[3] The applicant then made a representation for reinstatement to his employment under s. 20 of the Industrial Relations Act 1967 ('IRA'). Conciliation proceedings under the IRA between the applicant and the second respondent were attempted but were unsuccessful. Thereafter, the first respondent exercised his discretion not to refer the applicant's case to the Industrial Court for adjudication. Hence this application for judicial review by the claimant for orders of *certiorari* to quash the decision of the first respondent and for *mandamus* directing the first respondent to refer the matter to the Industrial Court.

The Law On Judicial Review

The Nature Of Administrative Law And The Distinction Between Private Law And Public Law

[4] HWR Wade in his work *Administrative Law, 1, 2* (1971) describes administrative law as being concerned with the nature of the powers of public authorities, and, especially, with the manner of their exercise. The protection of the citizen against abuse of power by the government is therefore the primary objective.

[5] Judicial review is a branch of administrative law that governs the relationship between the affairs of citizens as against public authorities. In contradistinction, private law regulates the affairs of citizens as between

A themselves. This dichotomy was recognised by Lord Denning in the case of *O'Reilly v. Mackman* [1982] 3 WLR 604 when he said:

> In modern times we have come to recognise two separate fields of law: one of private law, the other of public law. Private law regulates the affairs of subjects as between themselves. Public law regulates the affairs of
B subjects *vis-à-vis* public authorities.

[6] The jurisprudence that embodied the principle of the distinction between private and public law has its origins in the law as laid down in the ancient Roman Empire by the emperor Justinian who substantially reformed Roman law in the middle ages. Dicey in England, on the other hand, in his
C work *Law of the Constitution* in 1885 declared that in England there is no difference between public and private law. As seen in *O'Reilly v. Mackman* (*supra*) however, England has chosen instead to follow the jurisprudence of Justinian in recognising this distinction and have discarded the views espoused by Dicey.

D *Powers Of The Court To Grant Judicial Review*

[7] It is well recognised that judicial review is that branch of administrative law by which the High Court exercises its supervisory, as opposed to its appellate powers over the decisions of inferior tribunals and
E statutory bodies. The powers vested in the High Court in this country to grant judicial review derives from the Specific Relief Act 1950 and the Courts of Judicature Act 1964 ('CJA 1964') in particular para. 1 of the schedule to s. 25(2) CJA 1964. This vests the High Court with power to issue to any person of authority directions, orders or writs, including writs of the nature
F of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution. In an application for judicial review of a decision of an inferior tribunal or statutory body, the court may make an order for *mandamus*, prohibition or *certiorari*. An order of *certiorari* has the effect of quashing a decision of a judicial or quasi-judicial authority with the intention of
G restraining any *ultra vires* exercise of powers. An order of *mandamus* is directed to private or municipal corporations, or to any of its officers, commanding the performance of a particular actor duty mandated by law (see s. 44 of the Specific Relief Act 1950). An order of prohibition is directed only against a judicial or quasi-judicial authority in respect of proceedings
H before them. The applicable procedure that governs applications for judicial review is contained in O. 53 of the Rules of Court 2012 ('ROC 2012'). An application for judicial review may include a prayer for a declaration (O. 53 r. 2(2) ROC 2012).

The Grounds Upon Which Administrative Action Is Subject To Control By
I *Judicial Review*

[8] The traditional position of the law on judicial review is that the remedy is not concerned with reviewing the merits of the decision in which the application for judicial review is made. The remedy of judicial review

is primarily a review of the decision making process. In judicial review hearings the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction. See *Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 CLJ 227; [1998] 1 MLJ 305 which held as follows:

> First and foremost, it must be emphasized that in an application for *certiorari*, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is more concerned with the decision-making process and not the decision itself.

[9] The grounds upon which administrative action is subject to control by judicial review has however been widened. In the celebrated case of *Council of Civil Service Unions and Others Appellants v. Minister for the Civil Service Respondent* [1985] AC 374 Lord Diplock said as follows:

> Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
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> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review. I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure

A by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

[10] In our jurisdiction, the landmark decision in *R Rama Chandran v.* B *Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 AMR 433 stated in no uncertain terms that the court's review is not confined to process but also substance. In the Federal Court case of *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] MLJU 686 it was held:

C Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our Courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. *The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of "illegality",* D *"irrationality" and possibly "proportionality" which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the Courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.*

The Rama Chandran decision has been regarded or interpreted as giving the E *reviewing court a license to review without restraint decisions for substance even when the said decision is based on finding of facts.* (emphasis added)

[11] A recent case which illustrates the province of a court when hearing applications for judicial review is the case of *Ambank (M) Berhad v. Menteri Sumber Manusia & Anor And Other Appeal* [2014] 1 LNS 686 where the Court F of Appeal held:

29. The principles governing the approach to be taken in dealing with judicial review applications have been well and authoritatively laid down in a number of cases. Basically the court in such a context was to be mindful that it was not exercising appellate jurisdiction but merely G considering whether to extend its 'curial intervention' pursuant to its supervisory jurisdiction (that is, over inferior tribunals or administrative or quasi judicial decision makers).

30. *It has been accepted by the courts too that although as a matter of first principle judicial review was concerned primarily with the decision making process (not the* H *merits, substance or justification), there was an exception to that rule where the court could still go behind the decision, where the allegations raised were to the effect that the decision maker had transgressed principles of procedural impropriety, illegality or irrationality (may be even proportionality) in arriving at the impugned decision.*

In those circumstances it was open to the court to extend its scrutiny into the area of the merits or justification behind that decision.

I

31. More to the point at hand, we have judicial pronouncements which make it clear that the Minister's exercise of discretion or administrative powers under the provisions of the IR Act must always be within the objectives of the legislation and the scope of his statutory responsibilities.

The Federal Court in *Pahang South Union Omnibus Co Bhd v. Ministry of Labour & Manpower* [1981] CLJ Rep 74; [1981] 2 MLJ 199 (a recognition case) through Abdoolcader J noted:

> We can see no reason or justification for interfering with his decision on an application of the principles governing scope of judicial review we have administrated. The court cannot substitute its own judgment for that of the 1st Respondent and will invalidate the exercise of his judgment or discretion only if satisfied that no reasonable person charged with his statutory responsibilities and with a due and proper appreciation of his statutory duties could have exercised his power in the way that he did.

32. Hashim Yeop Sani CJ (Malaya) in the Supreme Court case of *Minister of Labour Malaysia v. Lie Seng Fatt* [1990] 1 CLJ Rep 195; [1990] 2 MLJ 9 (a case involving the Minister's discretion under s. 20(3) of the IR Act), summarised the position of the law involved as:

> The Minister's discretion under s. 20(3) is wide but not unlimited. As stated earlier, so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had misdirected himself in law or had taken into account irrelevant matter or had not taken into consideration relevant matters or that his decision militates against the object of the statute. Otherwise he had a complete discretion to refer a complaint ...

33. The Court of Appeal in *Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia Malaysia & Anor* [1998] 1 CLJ 227; [1998] 1 MLJ 305, speaking through Shaik Daud Md Ismail JCA said, that even where the statute mentioned a subjective formulation for the Minister's exercise of power (there, in respect of a reference to Industrial Court under s. 20(3), where it was provided - "... may, if he thinks fit ..."), the exercise of such discretion or power was not a mechanical one. The Minister had to make a thorough study of all aspects of the case and only then would its stand not be overruled.

> Whether a reference is made, therefore, depend on the facts and circumstances of each particular case. The court will only interfere when there is evidence to show that the discretion was exercised unlawfully. (emphasis added)

[12] A review of the foregoing cases suggest that the court in cases of this nature exercises supervisory and not appellate jurisdiction and confines itself to a review of the decision making process of the inferior body or tribunal. The exception arises in cases where these bodies in arriving at their decision have been guilty of procedural impropriety, illegality or irrationality. A fourth category, namely proportionality has been added to this. However, following the decision of the Federal Court in the case *Ranjit Kaur S Gopal Singh v. Hotel Excelsior* (*supra*), the previous distinction between review and appeal no longer holds. Thus in assessing whether the decision making body has run foul in arriving at their decision under any of these headings, the court invariably enquires into the merits and substance of such decisions.

[13] A useful summary of the description of these individual heads of challenge has been neatly and succinctly outlined in the case of *Tenby World Sdn Bhd v. Soh Chong Wan & Anor* [2013] 10 CLJ 822 by Vernon Ong J (as he then was) and I can do no better than reproduce verbatim what was said there in order to capture their essence:

> Procedural Impropriety
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> [18] This is a classic case of review of the decision-making process. It addresses the decision-making process to test for procedural fairness with reference to the context and applicable statutory provisions. It includes the right to be heard, the rule against bias and the requirement of prior notice of the decision so that the person affected by the decision will be in a position to make representations and to adequately prepare and answer the case against him. There is also a duty of adequate disclosure. Whilst there must be a fair hearing, there is no general right of oral hearing. There is no general right to call witnesses or to cross-examine witnesses. There is also no general right to legal representation. Whilst there is also no general duty to give reasons, such failure to give reasons may give rise to the inference that there are no valid reasons for the decision. Further, there must be a real hearing. The decision maker cannot fetter its discretion by self-created rules of policy. The decision maker must be impartial and free from bias; the test for bias being absence of direct pecuniary interest (*B Surinder Singh Kanda v. The Government Of The Federation Of Malaya* [1962] 1 LNS 14; [1962] MLJ 69; *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal* [1998] 3 CLJ 85 CA; *Rohana Ariffin v. Universiti Sains Malaysia & Another Case* [1988] 1 CLJ 559; [1988] 2 CLJ Rep 390).
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> Illegality
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> [19] This involves a review of the decision-making process, not the merits. This is a typical ground for the control of discretionary power. Classic examples of illegality include 'error of law' and 'excess of jurisdiction', abuse of power and *Anisminic* error. Under this head, the court will consider whether the public body in question had acted within the terms of power granted to it and within the bounds of the statutory purpose (*R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; *Ranjit Kaur Gopal Singh v. Hotel Excelsior* [2010] 8 CLJ 1). Decisions tainted with illegality may arise if a decision maker makes a decision for an extraneous purpose or improper motive or takes into consideration irrelevant factors and or fails to take into consideration relevant factors. The court must also be satisfied that the decision is not actuated by *mala fide*. The decision-making process must also not violate the rule against delegation of discretionary power or the rule against deciding on no evidence or making findings of fact with no rational evidential basis; though as a rule there is non-interference with the assessment of evidence, particularly testimonial evidence (*Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9; *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 1 MLJ 481; *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9; [2000] 2 AMR 2265).

Irrationality

[20] Under this ground, the issue is not whether the decision-maker strayed outside the purposes defined by the governing statute (the 'illegality' test), nor whether the decision was procedurally unfair (the 'procedural propriety' test). The question to be determined is whether the power under which the decision-maker acts, a power which normally confers a broad discretion has been improperly exercised. Therefore, a review under this ground extends beyond the process and to the substance or merits of the decision.

[21] A decision which falls on this ground is said to have failed the '*Wednesbury* unreasonableness' test (See *Associated Provincial Picture Houses Limited v. Wednesbury Corp* [1948] 1 KB 223). This is a decision that is said to be so outrageous in its defiance of logic that no sensible person who had applied his mind to it could have arrived at it. It also involves a consideration of the principle of 'proportionality' *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261; *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11). It may also include decisions taken in bad faith, oppressively or based on considerations which have been accorded manifestly inappropriate weight, in addition to strictly irrational decisions which are illogical or arbitrary (*R Rama Chandran*, (*supra*)).

Ministers Powers Under Section 20(3) Of The Industrial Relations Act 1967

[14] The functions of the Minister for Human Resources when deciding whether to refer a matter for adjudication before the Industrial Court have been clearly set out in a plethora of decisions which outline the scope of the said Ministers powers but it suffices for the present purposes to just refer to the following decisions in order to illustrate the principles applicable.

[15] In the case of *Minister of Labour & The Government of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195, it was held as follows:

The Minister had a discretion under s. 20(3) of the Act and that is not in dispute. The issue is whether the discretion is unfettered. To say it is an unfettered discretion is a contradiction in terms. Unfettered discretion is another name for arbitrariness.

The Minister's discretion under s. 20(3) is wide but not unlimited. As stated earlier so long as he exercises the discretion without improper motive the exercise of discretion must not be interfered with by the Court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute. Otherwise he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious which in our view this is one.

[16] In the case of *Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 CLJ 227, it was held:

Section 20(3) provides that "... The Minister may, if he thinks fit, refer the representation to the court for an award."

A From this it can be seen that s. 20(3) of the Act confers a discretion on the 1st respondent as to whether or not to refer any particular representation. Whether a reference is made must, therefore, depends on the facts and circumstances of each particular case. The court will only interfere when there is evidence to show that the discretion was exercised unlawfully.

B It was also argued before us that when all the materials are before the 1st respondent it was his duty to refer the complaint to the Industrial Court and not usurp the function of that court by making his own decision thereon.

C With respect, this line of argument seems to suggest that the 1st respondent is required to refer every complaint referred to him, to the Industrial Court, irrespective of whether it is a fit and proper case to do so. The law does not require the 1st respondent to do this, otherwise the position of the 1st respondent *vis-a-vis* the Act, would be that of an intermediary or a mere postman. It is not a mechanical exercise for the D 1st respondent in every case to refer to the Industrial Court. Section 20(3) provides that "... The Minister may, if he thinks fit, refer the representation to the court for an award".

[17] The scope and limits within which the Minister for Human Resources ought to exercise his powers were comprehensively set out in the case of E *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 1 MLJ 481 where Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal said as follows:

That said, it is however, necessary and desirable to identify, with as much precision as possible, the parameters of the discretion conferred by F Parliament upon the Minister. There are two reasons for this. First, all those who are charged with the implementation of the Act should be able to gauge with fair certainty the ambit of the discretion, the exercise of which is called for from time to time. Second, courts which are the repository of the power of judicial review of administrative action need to ascertain whether, in a given case, there may or may not have been G a transgression beyond the permitted ambit.

It may, I think, be stated as a very general guide that a fair exercise of the discretion in question would be that which best achieves the object of the Act. That object is disclosed in the preamble to the Act which declares itself to be an Act: to provide for the regulation of the relations between employers and workmen and their trade unions and the H prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom.

The approach that ought to be taken in a case where statute confers upon the executive a discretion to refer a dispute to a tribunal specially created I for that purpose was stated by Lord Denning MR in his dissenting judgment in *Padfield v. Minister of Agriculture, Fisheries & Food* [1968] AC 997 at p 1006 as follows:

It is said that the decision of the Minister is administrative and not judicial. But that does not mean that he can do as he likes, regardless of right or wrong. Nor does it mean that the courts are powerless to correct him. **Good administration requires that complaints should be investigated and that grievances should be remedied**. When Parliament has set up machinery for that very purpose, it is not for the Minister to brush it on one side. He should not refuse to have a complaint investigated without good reason. (emphasis added)

On further appeal, the House of Lords (Lord Morris of Borth-y-Gest dissenting) upheld the minority view expressed by the Master of the Rolls and reversed the majority. Upon the requirement that executive discretion should be exercised so as to attain the objects and policy of the Act conferring such discretion, the following opinions appearing in the speeches of the majority of the House are of assistance:

It is implicit in the argument for the Minister that there are only two possible interpretations of this provision - either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. (per Lord Reid, at p 1030);

The discretion must be exercised by the Minister in accordance with the intention of the Act but there is nothing in the language used in the subsection introduced by the words 'if the Minister in any case so directs' nor in the context of the Act and earlier legislation to support the view that an absolute right to an enquiry is given to an aggrieved person. The argument of the appellants is undermined, in my opinion, by their concession that trivial, frivolous or vexatious complaints can be shut out as, for example, where a complaint has been recently dealt with in a parallel case. True that the scheme is of a compulsory nature and s 19 [of the Agriculture Marketing Act 1958] is designed for the redress of grievances but this is not to exclude the Minister's discretion to reject a complaint if he exercises his discretion according to law. The succeeding section, s 20 of the Act, indicates the position of the Minister as responsible for giving directions to a board as to its acts or omissions as he considers necessary or expedient in the public interest and his directions have to be complied with so far as the board is not required to do anything which it has no power to do. (per Lord Hodson, at pp 1045-1046);

A It is quite clear from the Act in question that the Minister is intended to have some duty in the matter. It is conceded that he must properly consider the complaint. He cannot throw it unread into the waste-paper basket. He cannot simply say (albeit honestly) 'I think that in general the investigation of complaints has a disruptive effect on the scheme and leads to more trouble than (on B balance) it is worth; I shall therefore never refer anything to the committee of investigation.' To allow him to do so would be to give him power to set aside for his period as Minister the obvious intention of Parliament, namely, that an independent committee set up for the purpose should investigate grievances and that their report should be available to Parliament. This was clearly never C intended by the Act. Nor was it intended that he could silently thwart its intention by failing to carry out its purposes. (per Lord Pearce, at p 1053);

My Lords, I believe that the introduction of the adjective 'unfettered' and its reliance thereon as an answer to the appellants' D claim is one of the fundamental matters confounding the Minister's attitude, bona fide though it be. First, the adjective nowhere appears in s 19, it is an unauthorized gloss by the Minister. Secondly, even if the section did contain that adjective I doubt if it would make any difference in law to his powers, save to emphasize what he has already, namely that acting lawfully he E has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in F conferring a discretion upon the Minister rather than by the use of adjectives. (per Lord Upjohn, at p 1060).

Put simply, the first question which the Minister ought to ask himself is whether the way in which he proposes to exercise his discretion will have the effect of preventing or settling the particular dispute; for that is what the Act is primarily aimed at. G *However, as I have explained just a moment ago, this approach to the exercise of discretion is only a very general guide because a rigid adherence to it may result in every case being referred to the Industrial Court. That this is certainly not what Parliament intended is manifested by its conferment upon the Minister of a discretion whether to refer, or not to refer, a representation to the Industrial Court. The second question that the Minister must ask himself is whether, objectively speaking, the* H *representations made under s 20(1) are frivolous or vexatious. If they are, then he may well be justified in refusing a reference. Whether they are or are not depends upon the facts of each case*. But there are some pretty obvious cases where a reference may be properly denied.

Take the case of a workman who has admitted the commission of serious I misconduct such as an assault upon his employer or a fellow employee, or to theft of his employer's property; or where, for example, the employer, after dismissing the workman, repents and reinstates, or offers to reinstate him in his former employment without loss of any benefits or privileges. In all these examples, the Minister may well be within the purview of the section in declining a reference. In the last example, there is simply

nothing to refer because of the reinstatement or the offer thereof. If in such a case, the Minister does decide to refer, then, the exercise of his discretion may be quashed in *certiorari* proceedings as being obviously unreasonable. Reinstatement is the primary remedy in industrial law, and an acceptance of it or an unreasonable rejection of it by the workman must be treated as having put an end to the dispute.

I pause to emphasize that the Minister's decision, one way or the other, upon the question whether representations made under s 20(1) are frivolous or vexatious, is neither final nor conclusive, and may be reopened in judicial review proceedings. A court may, upon an objective assessment of the facts and material that was placed before the Minister, fairly come to the conclusion that the representation is, or is not frivolous or vexatious and hence merits reference to the Industrial Court for an award.

… To summarize, when a question arises as to whether the Minister has correctly exercised his discretion under s 20(3) of the Act, it is the solemn duty of a court to undertake a meticulous examination of the facts that were made available to the Minister. If the examination reveals that the representations made under s 20(1) are neither perverse, frivolous nor vexatious, a decision not to refer is liable to be quashed by an order of certiorari. (emphasis added)

[18] The principles as gathered from the above cases make it clear that the Honourable Minister has a wide discretion as to whether or not a matter should be referred for adjudication to the Industrial Court. However, if it is revealed that the representations made by a workman is not perverse, frivolous nor vexatious, the decision of the Honourable Minister is liable to be quashed by an order of *certiorari*.

Decision Of The Minister

[19] The reasons advanced by the Honourable Minister for his refusal to refer the applicant's representation to the Industrial Court are contained in the Ministers affidavit in reply affirmed on 23 October 2014. At the outset, it is pertinent to note that there is no duty or obligation on the part of the Minister to give any reasons for his decision. See the case of *Minister of Labour, Malaysia v. Sanjiv Oberoi & Anor* [1990] 1 CLJ 44; [1990] 1 CLJ (Rep) 200 and the decision in *Joseph Puspam v. Menteri Sumber Manusia, Malaysia & Anor* [2001] 4 CLJ 252.

[20] In any event, the Minister (first respondent) in this case did give his reasons for the non-referral of the applicant's representations. These are apparent from his affidavit affirmed on 23 October 2014 from paras. 4 until 16. In summary they are as follows:

(a) The performance of the applicant was satisfactory for the years 2009 to 2011. In 2012, the second respondent did not conduct a performance appraisal as the applicant's superior Mr Michael Broderick was transferred in November 2012. In 2013, the applicant's performance was found to be unsatisfactory by the second respondent. This is evident from the email dated 25 July 2013;

(b) During the reconciliation meeting the applicant had said that Mr Mick Ward the new Director of Internal Audit had come to Penang and conducted a review audit work, project management schedule regarding the Penang Hill Side Audit – OTC. At that time, Mr Mick Ward had said that he was dissatisfied with the applicant's work performance especially in the area of methodology to be used. This was in April 2013;

(c) In July 2013, the Director of Internal Audit spoke to the applicant about his poor performance whilst the applicant was in the USA. The areas the Director of Internal Audit highlighted were (i) project and time management skills, (ii) technical internal audit skills, (iii) interpersonal skill;

(d) On 29 August 2013, the Manager of Human Resources had arranged for a teleconference to discuss the applicant's performance;

(e) The second respondent had suggested that the applicant be placed on a performance improvement plan (PIP). The applicant was never prevented by the second respondent from being placed on the PIP. During the reconciliation meeting, the applicant had asked that he be reinstated "until he obtained another job" and refused to agree to be placed on the PIP. The issue that the Director of Internal Audit did not think that the PIP would have any effect and that the applicant ought to resign was never raised at the said reconciliatory meeting;

(f) According to the applicant's own email dated 3 September 2013, the applicant made reference to the conference call between himself and Mr Mick Ward and suggested three options namely, (i) PIP-with intention to help him to improve on areas failing short of IA Director's expectation, or (ii) provide sufficient time for him to look for the next IA job in the market and he will be happy to exit, or (iii) compensate him and he moves on. The applicant decided on option 2. Despite opting to leave the second respondent, the applicant did not give any time line as stated in the email dated 13 September 2013;

(g) The emails dated 13 September 2013 and dated 17 September 2013 respectively wherein the applicant had said "I cannot agree to PIP under any circumstances now since the intention was clearly to transition me out". The applicant ought to have given PIP a chance;

(h) The conference call on 29 August 2013, the emails dated 3 September 2013, 13 September 2013 and 18 September 2013 wherein the second respondent had explained that the applicant had misunderstood the PIP and the second respondent had explained the rationale of the PIP;

(i) The applicant's email dated 18 September 2013 where the applicant had alluded to the fact that his past performance was "meeting expectations" but also considered the fact that the applicant's current performance fell to be assessed by the new Director of Internal Audit namely, Mr Mick Ward and the fact that the applicant was aware that the second

respondent was unhappy/dissatisfied with the applicant's performance and therefore, the applicant's refusal to be placed on PIP was unreasonable;

(j) Took note of the second respondent's email dated 24 September 2013 which contained proposals in respect of a mutual separation package offered by the second respondent and the applicant's counter proposals;

(k) The fact that the second respondent issued a letter of separation wherein the second respondent had stated that they had accepted the applicant's separation offer however, they were unable to comply with his claim of compensation amounting to 16 months. Also took into account the fact that the second respondent had paid the applicant's compensation and the applicant had accepted it;

(l) The fact that on 3 October 2013, the applicant replied to the second respondent stating that he accepted the compensation but that he objected to the separation. Even though the applicant objected to the separation, nevertheless he never returned the compensation received;

(m) Took into account the fact that the applicant had not committed any misconduct and in the letter of separation, the second respondent did not raise the issue of the applicant's poor performance.

Analysis And Findings

[21] What were the main reasons that influenced the first respondent in coming to his decision? Firstly, the first respondent was of the view that the applicant ought to have given the PIP a chance and not unreasonably refused to be placed under it. Secondly, even though the applicant objected to the separation, he never returned the compensation received. It was also the view of the first respondent that the separation was by mutual consent.

[22] With respect to the fact that the applicant refused to be placed on the PIP, it is the contention of the applicant that his refusal was grounded upon the fact that there was an attempt to oust him from the employment of the second respondent in any event. Was the refusal of the applicant unreasonable under the circumstances? Would not any reasonable person who perceived that the implementation of the PIP was merely a prelude to shepherding their exit from the second respondent have reacted in the same manner? In any event whether or not the applicant's refusal to accept the PIP was reasonable or not under the prevailing circumstances is not within the province of the first respondent to decide. The first respondent was also of the view that the applicant had no concrete proof as to the fact that it was the second respondent's intention to oust him from employment should he have agreed to be placed under the PIP. Such factual matters ought to be determined by the Industrial Court instead. It is their role and function to inquire as to factual matters of this nature. If, as contended by the applicant, the intention of the second respondent in suggesting that the applicant be placed on the PIP was to facilitate his exit out of the second respondent, the Industrial Court is the proper body empowered by statute to adjudicate and

determine upon these matters. It is the duty of the Industrial Court in a reference under s. 20 of the IRA to determine whether or not, firstly, there was a termination and secondly, if so, whether the termination was for just cause and excuse. Therefore the question of whether or not the applicant was justified in refusing to accept the PIP which eventually led to the compensation package being paid to him in return for him leaving the employment of the second respondent and the concomitant question of whether under those circumstances there was a termination of employment as contended by the applicant are matters within the sole competence of the Industrial Court. It is not for the first respondent to delve into the merits of the case in order to determine the matter. This proposition was authoritatively laid down in the case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan And Another Appeal* (*supra*) where it was held:

> *It follows from these decisions that the Minister must bear in the forefront of his mind that the Act has established a special tribunal to adjudicate upon a dispute arising from representations made under s 20(1) of the Act, and that it is therefore no part of his function to arrive at a concluded view upon the merits of the dispute.* His role is limited to ascertaining whether, on the facts and material placed before him, the representations raise serious questions of fact or of law calling for adjudication. And, as I have already said, his determination upon the question one way or the other is not conclusive. (emphasis added)

[23] On that score, the finding of this court is that the first respondent had therefore taken into account an irrelevant consideration in coming to his decision not to refer the matter to the Industrial Court for adjudication.

[24] The first respondent had also relied on the fact that the applicant even though he registered his protest to the separation, had never returned the compensation money he received from the second respondent. The contention of the first respondent therefore is that the applicant is estopped from proceeding with his representation for unfair dismissal. Industrial adjudication and jurisprudence is quite unlike normal civil litigation. The Industrial Relations Act 1967 (IRA) was intended to promote industrial harmony and is a piece of social legislation. In fact pursuant to the provisions of s. 30(5) IRA the court (Industrial Court) is enjoined to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. From this it can be gathered that the normal rules of evidence and procedure that normally operate in the sphere of civil evidence and procedure do not apply with equal force to industrial proceedings. Even though s. 30(5) of the IRA applies to proceedings before the Industrial Court, the spirit and intention of the IRA and the manner in which industrial disputes ought to be approached as a whole is clearly evident.

[25] It is equally clear following from all that has been said above that the principle of estoppel has no place in industrial adjudication. That much is evident from the case of *Nadarajah & Anor v. Golf Resort (M) Sdn Bhd* [1991] 1 ILR 704 which was subsequently affirmed by the High Court. The representation made by the applicant under s. 20(1) of the IRA is for unfair

dismissal. The primary remedy under that section is reinstatement to his previous employment without loss of benefits. The fact that the Industrial Court chooses not to grant reinstatement but compensation in appropriate cases does not detract from the fact that the primary remedy is reinstatement. Should the Industrial Court eventually find that the termination was without just cause or excuse, being a court enjoined to act according to equity and good conscience, in assessing any compensation due to the applicant, without doubt will have due regard to any monies paid and the appropriate deduction will be made for the compensation already received. Therefore the fact that the applicant accepted the compensation from the second respondent does not in any way prevent or bar him from seeking the remedy of reinstatement from the Industrial Court. This is also another fact that influenced the decision of the first respondent in deciding not to refer the matter to the Industrial Court. This was a matter which he was not entitled to take into account and therefore an irrelevant consideration. It follows therefore that the representations of the applicant are not frivolous or vexatious.

[26] It is fairly evident from a perusal of the reasons given by the first respondent that he was obviously of the concluded view that the letter of separation given by the second respondent to the applicant indicated that the separation was on a mutual basis. This is evident from the reason given by the first respondent that the applicant had not committed any misconduct and in the letter of separation, the second respondent did not raise the issue of the applicant's poor performance. This reasoning ignores the factual background that led to this dispute arising in the first place and that is that from the applicant's perspective, the intention to place him on the PIP arose out the concerns of the second respondent in respect of his performance and that the reason he refused to agree to the implementation of the PIP was his perception that it was the second respondent's intention to exit him from the company obviously on grounds of poor performance. Whether or not the applicant's perception was reasonable or not under the circumstances was not one for the first respondent to make but was a question that was best left to the Industrial Court. The first respondent had therefore embarked on a consideration of the merits of the dispute and so exceeded his province by taking into account an irrelevant consideration.

[27] One other matter requires consideration. It is the submission of the second respondent's learned counsel that at the conciliation proceedings, the applicant had sought to be reinstated but only until such time when he found alternative employment. Learned counsel for the second respondent submits that the representation of the applicant for reinstatement is thus not genuine. Learned counsel for the applicant, on the other hand submits that the matters that transpired during the conciliation hearing are not meant to be used against the applicant in the event no settlement is reached. The reason is that parties are encouraged to be forthright while engaged in discussions to reach an amicable settlement and it would be inimical to such efforts if parties were aware that should the attempts to conciliate fail, what they had disclosed might come back to haunt them at a later stage. This court finds itself in

agreement with the views as expressed by the learned counsel for the applicant. A contrary view would also militate against the overall scheme of the IRA as being a piece of social legislation engineered with a view to promoting industrial harmony. In fact in line with this, s. 54 of the IRA prohibits matters arising in conciliation proceedings from being used during adjudication proceedings at the Industrial Court. Section 54 IRA reads as follows:

> (1) Where a trade dispute relates to matters as to which negotiation or conciliation proceedings have taken place under this Act, no evidence shall be given in the proceedings before the Court as to such negotiation or conciliation proceedings other than a written statement in relation thereto agreed to and signed by the parties to the dispute.
>
> (2) In a proceeding before the Court on a reference to the Court under subsection 20(3), no evidence shall be given of any proceeding before the Director General under subsection 20(2) other than a written statement in relation thereto agreed to and signed by the parties to the reference.

[28] A similar prohibition ought to apply at the current stage of proceedings ie the referral stage, in line and in accord with the spirit and intendment of the IRA. Placed in its proper context, this was not exactly a situation where the second respondent had 'repented' or reinstated or unconditionally offered to reinstate the applicant. This was quite unlike the scenario alluded to in the case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal* (*supra*). This court therefore finds that whatever transpired between the parties at the conciliation stage ought not to be taken into account in considering the intentions of the applicant with respect to his claim for reinstatement.

[29] In conclusion, this court, having undertaken an analysis of the examination of the facts that were made available to the Minister finds that the representations made under s. 20(1) IRA were neither perverse, frivolous nor vexatious. It is therefore the considered view of this court that the decision of the first respondent was a decision no body similarly circumstanced would arrive at and therefore was unreasonable in the *Wednesbury* sense and thus liable to be quashed as being irrational.

Decision

[30] The upshot is that the application of the applicant for judicial review against the decision of the first respondent given on 30 April 2014 in refusing to refer the applicant's complaint of representation for unfair dismissal to the Industrial Court for an award is allowed with costs. *Certiorari* is issued to quash the decision of the first respondent and an order of *mandamus* to the first respondent directing him to refer the applicant's representations for adjudication before the Industrial Court.